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# Analytics

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# All in Good Time

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## Dear readers,

This is a new spring issue of our corporate edition “Korpus Prava.Analytics”.

There is time for everything. Spring replaces winter, new amendments to laws replace the old ones, property is transferred to new owners, and shareholders alternately replace each other. Time comes for everything. Every day we face new urgent issues, which we are trying to find the right answer to.

We devoted this issue to the inheritance of property abroad and minority shareholders. Our Leading Lawyer Tatiana Frolova has prepared an article, in which she reveals the main procedure for inheriting property abroad, examines the nuances of the legislation in European countries and gives recommendations to the heirs. Pay attention to this topic, since it is very relevant.

Our Junior Lawyer Roman Moskovskikh elaborates on the topic of a healthy corporate climate in Russia and pays attention to the relations between shareholders (minority and majority). In the pages of our edition you will find out why minority shareholders are considered a weak link in the corporate relations system, what are the aspects in the field of implementation of the rights of minority shareholders and whether the shareholder’s authorities depend on the size of the stock of shares.

Business is a very dynamic sphere, and it is difficult to predict what new challenges we will face in the future. Today we again write about the law on controlled foreign companies and explain the duties of the tax resident of the Russian Federation with respect to participation in a foreign company.

We could not pass by the relevant topic — the bankruptcy of a legal entity. Our experts introduce you to a number of innovations aimed atensuring the rights and legitimate interests of creditors in cases of bankruptcy of legal entities.

Take care of your business, take care of your time!

See you next time in the pages of “Korpus Prava.Analytics”!

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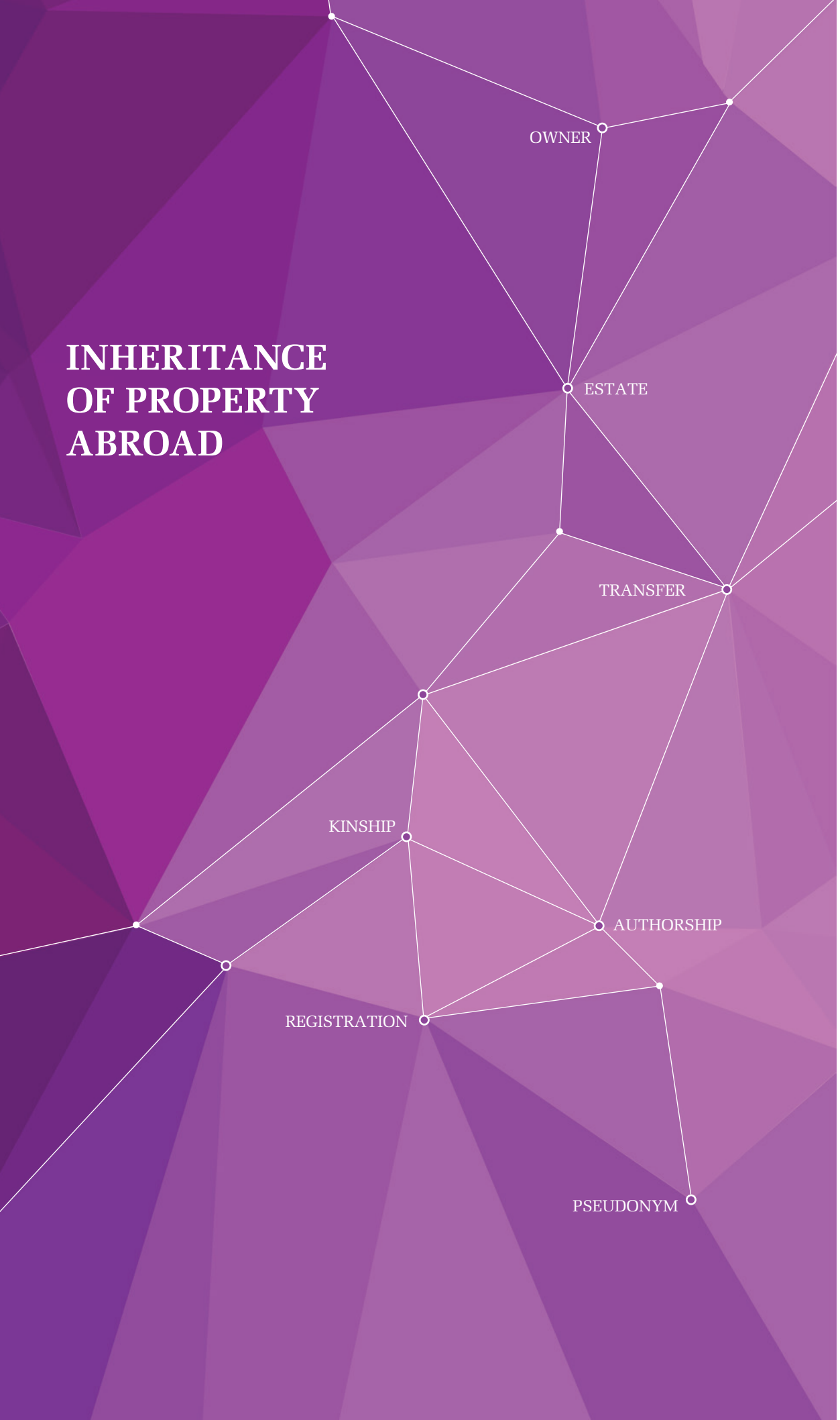
# INHERITANCE OF PROPERTY ABROAD






**Tatyana Frolova**
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Sooner or later every person who owns property starts thinking about what will happen to his/her assets after his/her death.

Modern civil law system provides two options of transfer of property of the deceased owner to his/her heirs. If the person has not made any will, his/her property will be transferred to his/her heirs in the manner provided for inheritance by law.

Regardless of what kind of property is included into estate and in under which procedures it is inherited, the acceptance of the inheritance is the same in any case.

The opening of the inheritance is the day of the death of the testator. The period for the accession to the inheritance is determined by the Civil Code within six months. During this period, the heirs should apply to the notary office, submit a death certificate, documents confirming kinship and an extract from the last place of residence (registration) of the deceased person.

The estate includes the entire property of the deceased person, excluding personal non-property rights and other intangible benefits such as:

- Right of authorship under which the heirs may not call themselves authors of a work;
- The right to name, that is the heir does not solve issues related to the fact under which name or pseudonym the work will be published;
- The right to inviolability of the work, according to which the work should be used in the form created by the author.

The estate may include not only property located in the Russian Federation, but also all assets of the testator located in other countries.

When inheriting the property located abroad, it should be noted that in this case inheritance rules will be governed by the laws of other countries.

Russian civil legislation provides that property is inherited under the laws of the country, of which the testator was last resident. Thus, when deciding on the application of legislation of a particular country, the citizenship of the deceased person is of no fundamental importance. It is important where the testator lived before his death.

However, in respect of immovable property, the procedure of inheritance, stipulated in the country where the property is located, applies.

Laws of European countries are similar to the regulations of the Civil Law

of the Russian Federation, although each country has its own peculiarities.

For example, when inheriting property in the UK, the heirs should first make payments under debt obligations of the deceased person to creditors, after which they should pay all taxes due to the state.

Things are slightly different in France. First, it is necessary to pay taxes, and then settle debts with creditors.

It should be noted that unlike Russia, in most countries the heirs should pay the inheritance tax.

The tax rate mostly varies depending on the amount in which the estate is valued. For instance, in England the inheritance tax (IHT) is paid by the heirs of the deceased person who have come into his/her inheritance. Property estimated at less than 325 000 is not subject to the inheritance tax. The property exceeding the amount of £ 325 000 will be taxed at the 40% rate. For people who were legally married before the death of one of the spouses, this threshold is increased to £ 650 000.

In France, inheritance taxes are also paid by the heirs. The amount of tax depends on the degree of kinship between the heir and the testator. In joint ownership of real estate, the spouses have equal rights to it. After the death of one of the spouses, all property rights are transferred to the other spouse without payment of taxes. If the marriage was not registered, the people living together are deemed to be outsiders and pay taxes regardless of the period of cohabitation and management of the common household. Only after the death of the second spouse, the property is transferred to the children who were born in this marriage. The children are already required to pay the inheritance tax.

Inheritance tax rates in France are from 20% in the case of a straight line to 60% for heirs who have more distant kinship or heirs who are not related at all.

The heirs are not required to pay the inheritance tax in Bulgaria. Except the situations when an object worth more than 250 000 levs is transferred to third parties who are not relatives.

When inheriting property abroad, it should be remembered that the periods of inheritance in different countries differ in duration. The period of inheritance varies from 3 months to a year. In some countries, for example in Bulgaria, it is quite easy to restore the period. In other countries, for example in Latvia, the heir who has missed the inheritance period has to prove in court that he/she had good reasons not to inherit the property timely.

A number of differences lie in the definition of lines of heirs and terms of inheritance. For instance, the German Civil Code stipulates five lines of heirs:

- The first category — lineal descendants of the testator;
- The second category — the parents of the testator and lineal descendants;
- The third category — grandparents of the testator and lineal descendants;
- The fourth category — great-grandparents of the testator and lineal descendants;
- The fifth category — great-great-grandparents of the testator and lineal descendants.

The Civil Code of France stipulates that the inherited property is transferred in the descending line. If there are no relatives of this category, the property is divided in equal parts between paternal and maternal descendants. The laws also stipulate a provision on lateral inheritance.

In the Republic of Cyprus, parents are referred to the second inheritance line but not to the first. The first line includes only children of the testator, and the spouses are set apart. They have special inheritance rights: if there are children, they have a predominant heritage share (3/4), and the rest can be claimed by the spouses. If there are no children, the spouse is entitled to at least half of the property. In Cyprus, there is a restriction on free disposal of property by will. It means that the abovementioned shares are mandatory not only for inheritance under law but also upon availability of the will. They are deemed mandatory shares under laws of Cyprus.





In any case, to inherit the property located abroad the heir should first apply for acceptance of the inheritance to a notary public in Russia.

Based on that application the inheritance and inheritance case are opened. Upon the receipt of a certificate of the right of inheritance, the certificate should be apostilled. The apostille entitles the heir to act by virtue of this document abroad.

Upon the receipt of the apostilled certificate of the right of inheritance, the heir may apply to a notary public in the country where the property in question is located. The notary public in charge of the inheritance case in the respective country will check the existence of other claimants to the inheritance as well as unpaid debts and tax payments that are accounted for by this asset.

After all necessary procedures the heir receives the state-recognized certificate of the country where the inheritance is located, the property is subject to mandatory registration in the relevant register.

As mentioned earlier, there are two ways of inheritance: by law and by will. However, in inheritance by will it is highly likely that the heirs will not get everything the testator intended to give them. On the one hand, the will may be litigated in court, on the other hand, the law provides for a mandatory share for the heirs, who are dependents of the deceased person. The mandatory heirs are entitled to half of what they can claim by law. For instance, if under the law the testator had one heir who is a minor child, regardless of who the will is be executed for, the heir will get half of the estate property by law.

It is possible to ensure the maximum protection of one's assets both during the lifetime and after the death through the establishment of a trust or a family fund. In transfer of assets to the trust, the owner transfers his/her property in trust, but remains a beneficiary. De jure, the founder of the trust is not the owner of the trusted assets, but he remains the one de facto. It is possible to specify in detail not only the management procedure and the rights of the beneficiary, but also to describe the procedure of inheritance of the trusted property in trust agreement.

Given that the trusted property is formally not an asset of the beneficiary, it is not included into the estate; accordingly, the rules regarding the mandatory share in the inheritance are not applied to it. In addition to protecting the will of the testator and the assets themselves, trusts have another advantage over the usual will for taxation of income being transferred into the ownership of the heirs. The tax is paid only upon the receipt of money from the trust as profit or dividends.

Among foreign assets that can be included into the estate, bank accounts are inherited according to special procedure.

In practice, in the event of the death of the account holder, his/her account is to be frozen by the bank until his/her heirs assert themselves and are identified. All heirs who have asserted themselves will be deemed to be legal successors of the account holder by the bank. The bank does not divide funds held in the account in accordance with the inheritance law. The account will be unlocked only when the bank receives exhaustive information about all heirs. The basis for access to the assets stored in the account is the payment instruction, which should be signed in the presence and with the consent of all heirs. Should one of the heirs disagree, the access will be blocked until all heirs reach the agreement to sign the general payment instruction or a general instruction on the transfer of funds.

The bank generally requests special documents from the heirs. In addition, they should provide evidence of their status as legal heirs of the account.

It is important for owners of foreign assets to make sure during their lifetime that their heirs have all necessary information about the property, accounts and assets which should be transferred into their ownership. This information will greatly facilitate their procedure of obtaining the inheritance.

# RECONNAISSANCE IN FORCE



**Anna Senchenko**
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It has been three years since the Law On Controlled Foreign Companies was adopted. The law has become an integral part of the Tax Code of the Russian Federation. Many things have changed for the past three years. In the course of adoption of amendments to the law, certain provisions of laws on controlled foreign companies had to be changed. Other provisions had a variety of unclear explanations of regulatory bodies which contained conflicting opinions.

As a result, according to the provisions of tax laws and the latest explanations, the duties of a tax resident of the Russian Federation regarding participation in a foreign company are as follows:

## Submission of notices of participation in a foreign structure

Tax residents of the Russian Federation are under obligation to inform a tax authority of the Russian Federation about their participation in foreign organizations and foreign structures with no corporate status (trusts) not later than within 3 months from the date of occurrence or change of such participation interest. Please be aware that the deadline for submitting the notice has changed, previously it was “not later than within 1 month from the date of occurrence or change of such participation interest”. The notice shall be submitted only at the moment of occurrence or change of the participation interest (including termination of participation).

Failure to submit such notice within the established deadline as well as submission of false information is punishable by the fine of 50 000 Russian rubles concerning each foreign organization.

## Submission of notice of controlled foreign company

If a foreign organization, which a tax resident of the Russian Federation is a direct or an indirect participant in, is deemed controlled according to the Tax Code of the Russian Federation, in addition to a single notice of participation, the resident of the Russian Federation shall submit annually a notice of a controlled foreign company.

The following persons/entities — tax residents of the Russian Federation — shall submit the notice of CFC:

- Individuals or legal entities whose participation interest in a foreign organization is more than 25%, or

- Individuals or legal entities whose participation interest in this organization (for individuals — jointly with their spouses and minor children) is more than 10%, if the participation interest of all entities deemed to be tax residents of the Russian Federation in this organization is more than 50%.

The notice of CFC shall be submitted not later than on March 20 of each year following the tax period when retained earnings of the CFC is taken into account at determining the tax base for a controlling person (Fig. 1).

Also please be aware that the position of the Ministry of Finance is that taxpayers shall inform a tax authority on controlled foreign companies in respect of which they are controlling parties, regardless of the amount of income received by them as profit of the respective controlled foreign companies.

Failure to submit such notice within the established deadline as well as submission of false information is punishable by fine of 100 000 Russian rubles concerning each foreign organization.

## Payment by a controlling person of tax from retained earnings of a controlled company

If the profit of a controlled foreign company is more than 10 000 000 Russian rubles (profit of the controlled foreign company for 2015 is 50 000 000 Russian rubles, and 30 000 000 Russian rubles for 2016 under transit provisions), the profit of the controlled foreign company shall be taken into account when determining the tax base for the tax period on the relevant tax.

At determining the profit of the controlled foreign company, income as dividends paid out by Russian organizations are not taken into account, if the controlling person of this controlled foreign company has an actual right to such income.

Thus, when the income of the controlled foreign company includes the amount of dividends, the amount of such dividends does not reduce the profit of the controlled foreign company for the purposes of applying threshold values[1].

Concerning loss it has been established that if a loss is determined according to the financial statements of the controlled foreign company prepared in accordance with its personal law for a fiscal year, the specified loss may be carried forward without any restrictions and taken into account at determining the tax base of this company.

In addition, the loss incurred by the controlled foreign company before January 1, 2015 according to the financial statements prepared in compliance with its personal law may be carried forward in the amount not exceeding the amount of the loss for the three financial years preceding January 1, 2015 and may be taken into account when determining the tax base of this company.

In view of the fact that the carry-forward of the loss incurred by the controlled foreign company is the right of the controlling person, the specified losses do not reduce the amount of profit of the controlled foreign company for the purposes of applying threshold values.

At the same time, it is not uncommon when the company's fiscal year does not coincide with the calendar year. In this case, if the period, for which the financial statements of a controlled foreign company is prepared, begins, for example, on October 1 of each year and ends on September 30 of each year:

- The profit of the fiscal year from October 1, 2014 to September 30, 2015 is not taken into account in determining the profit of the organization (income of an individual) received by the taxpayer recognized as the controlling person of the relevant controlled foreign company;
- The profit of the financial year from October 1, 2015 to September 30,

1. Letter from the Ministry of Finance of the Russian Federation No. 03-12-10/1290 dated January 16, 2016.





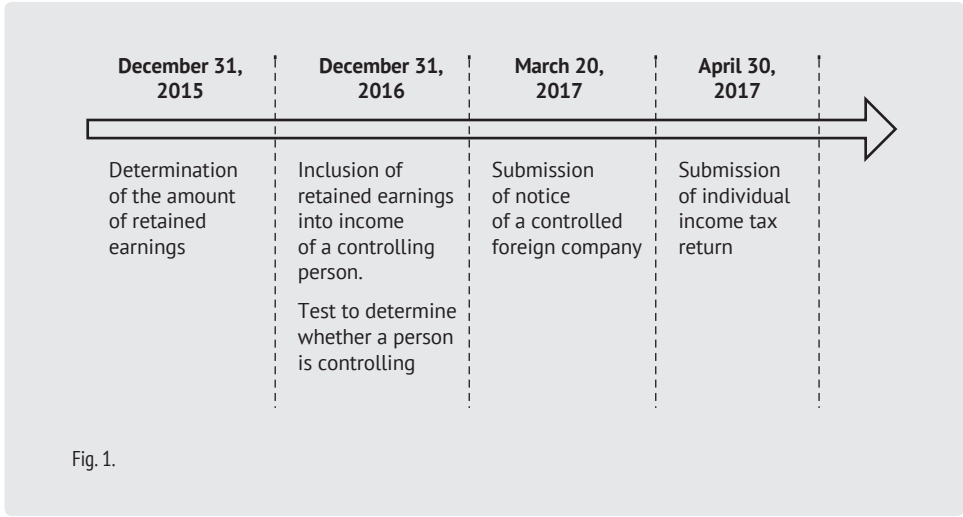


Fig. 1.

2016 is taken into account when determining the profit of the organization (income of an individual) received by a taxpayer recognized as the controlling person of the relevant controlled foreign company in 2017[2].

The following explanation has been given concerning documentary proof of the amount of profit (loss) of the controlled foreign company.

The taxpayer-controlling person shall submit a tax return on tax, when determining the tax base on which the profit of the controlled foreign company is taken into account, together with the following documents:

- Financial statements of the controlled foreign company for the period, for which the profit is taken into account when determining the tax base for corporate income tax, in respect of which the tax return is submitted, or other documents in the event of absence of the financial statements;
- Audit opinion on the financial statements of the controlled foreign company, if, in accordance with the personal law or the constituent (corporate) documents of this controlled foreign company, compulsory audit of these financial statements is established or the audit is carried out voluntarily by the foreign organization. However, the audit opinion shall not be submitted if the profit of the controlled foreign company is determined by the data of its financial statements in accordance with Chapter 25 of the Tax Code of the Russian Federation.

According to the Ministry of Finance of Russia, the taxpayer-controlling person's responsibility regarding the submission of tax reports of the controlled foreign company together with tax declaration on the tax, which reflects the profit of the controlled foreign company, to a tax authority is not established since the documents attached to the tax declaration are established by Article 25.15 of the Code. The specified provision of Article 309.1 regulates the procedure for confirming the profit of the controlled foreign company in the event of tax control measures.

In addition, the documents confirming the calculation of the profit of the controlled foreign company are subject to translation into Russian to the extent necessary to confirm the calculation of the profit (loss) of the controlled foreign company. Moreover, the Code does not contain provisions concerning the need to obtain and submit to tax authorities notarization and apostilization of copies of documents confirming the existence of control, exemption of profit of the con-

2. Letter from the Ministry of Finance of the Russian Federation No. 03-12-11/2/7395 dated February 10, 2017.

trolled foreign companies from taxation in the Russian Federation and calculation of their profit[3].

Both tax authorities and taxpayers have worked in terms of explanations and a deeper understanding of the norms of tax laws, respectively, for the past three years. However, there are still many open issues as well as issues that are yet to arise, since business processes are very dynamic substance and it is difficult to predict what new challenges we will face in the future. A

3. Letter from the Ministry of Finance of the Russian Federation No. 03-12-11/2/7395 dated February 10, 2017.

# EXCHANGE DIFFERENCES



**Igor Chaika**
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Exchange differences arise in accounting and tax accounting, and also affect the amount of taxes of the organization. The purpose of this article is to consider the procedure of the impact of exchange differences on values of assets and liabilities in accounting, on the VAT tax base and the tax base for income tax as well as on the profit of CFCs.

## Let us compare the regulations established for the calculation of exchange differences in accounting and tax accounting

| | Accounting (RAS 3/2006) | Tax accounting (Chapter 25 of the Tax Code of the Russian Federation) |
|---|---|---|
| **Definition of exchange difference** | Exchange difference is the difference between the ruble value of an asset or liability, which value is expressed in a foreign currency as of the date of the fulfillment of payment obligations or the reporting date of such reporting period, and the ruble value of the same asset or liability as of the date of its acceptance for accounting in the reporting period or the reporting date of the previous reporting period. | For the purposes of this Chapter exchange gain (loss) means the exchange difference arising at increases (decreases) in the value of property as currency assets (except securities denominated in foreign currency) and claims which value is expressed in foreign currency or at increases (decreases) of value of liabilities, which value is expressed in foreign currency. |
| **Exchange rate used for conversion** | The official exchange rate of foreign currency to the Russian ruble determined by the Central Bank of the Russian Federation. | The exchange rate of foreign currency to the Russian ruble determined by the Central Bank of the Russian Federation or the exchange |

| Accounting (RAS 3/2006) | Tax accounting (Chapter 25 of the Tax Code of the Russian Federation) |
|---|---|
| If any other exchange rate is determined for the conversion of value of the asset or liability expressed in foreign currency by law or agreement of the parties, the conversion shall be made at that rate. | rate of foreign currency (notional currency units) to the Russian ruble determined by law or agreement of the parties, if the value of claims (liabilities) subject to payment in Russian rubles, which is expressed in that foreign currency (notional currency units), is determined at the rate established by law or agreement of the parties respectively. |
| **Date of conversion** | |
| Conversion of the value of currency notes in cash register of the organization, funds on bank accounts (bank deposits), cash and payment documents, securities (excluding shares), funds in settlements, including on borrowing obligations with legal entities and individuals (excluding funds of received and issued advances and prepayments, deposits) expressed in foreign currency into Russian rubles shall be made at the date of the transaction in foreign currency, as well as at the reporting date (paragraph 7 of the RAS 3/2006). | The last day of the current month — on income (expenses) in the form of exchange gains (losses) on property and claims (liabilities), which value is expressed in foreign currency (excluding advances).<br>The claims (liabilities), which value is expressed in foreign currency, property in the form of currency values are converted into Russian rubles at the rate established by the Central Bank of the Russian Federation as of the date of transfer of ownership of the said property, termination (fulfillment) of claims and (or) on the last day of the current month, depending on what happened earlier. |
| **What is not converted** | |
| For the preparation of financial statements, the value of investments in non-current assets (fixed assets, intangible assets, etc.), inventories and other assets not listed in paragraph 7 of RAS 3/2006, as well as funds of received and issued advances and prepayments, deposits are accepted in the value in rubles at the rate that was in effect at the date of the transaction in foreign currency, as a result of which these assets and liabilities are accepted for accounting. | In the event of receipt (transfer) of the advance, the deposit, income (expenses) expressed in foreign currency are converted into Russian rubles at the official exchange rate determined by the Central Bank of the Russian Federation as of the date of receipt (transfer) of the advance, deposit (to the extent attributable to the advance, deposit). |
| **Determination of the value of assets, expenses and income in the event of advance payment (receipt)** | |
| Assets and expenses, paid by the organization on a preliminary basis or in payment for which the organization has transferred the advance or deposit, are recognized in the accounting records of this organization in the value in Russian rubles at the rate that was in effect at the date of conversion of the funds of the advance, deposit, prepayment (to the extent attributable to the advance, deposit, prepayment). | The procedure in general is the same as the procedure established for the purposes of accounting. |





| Accounting (RAS 3/2006) | Tax accounting (Chapter 25 of the Tax Code of the Russian Federation) |
|---|---|
| Income of the organization, subject to receipt of an advance, deposit, prepayment, is recognized in the accounting records of this organization in the value in Russian rubles at the rate that was in effect at the date of conversion of the funds of received advance, deposit, prepayment (to the extent attributable to the advance, deposit, prepayment) to Russian rubles. | |

## What are the differences?

Thus, as of the beginning of 2017 there is only one significant difference between the procedure of formation of exchange differences in accounting and in tax accounting. In tax accounting, the value of securities denominated in foreign currency is not revalued, while the same (except shares) is revalued in accounting.

It is also possible to determine the difference in the date of periodic revaluation. In tax accounting, the periodic revaluation is carried out for the last day of the current month, while the same is made for the reporting date in accounting. The date on which the accounting (financial) statements are made (the reporting date) is the last calendar day of the reporting period.

The reporting period for annual accounting (financial) statements the (reporting year) is the calendar year — from January 1 till December 31 inclusive, except the cases of incorporation, reorganization and liquidation of the legal entity.

The reporting period for interim accounting (financial) statements is the period from January 1 till the reporting date for which the intermediate accounting (financial) statements are prepared, inclusive.

There are currently no general requirements for preparation of the interim accounting statements, therefore periodic revaluation of the value of assets and liabilities, the value of which is expressed in foreign currency, may be basically made once a year. But usually the revaluation is made monthly, just like in tax accounting (less often — quarterly), although the accounting policy

## Comparison of the need for revaluation of various assets and liabilities, as well as the procedure of formation of income and expenses in accounting and tax accounting

| Accounting object | Accounting | Tax accounting |
|---|---|---|
| Fixed assets | Not revalued after acceptance for accounting.<br>If the advance is transferred prior to the recognition of fixed assets goods or materials, the prepaid part of the value of property is taken into account at the rate applicable at the date of transfer of the advance, while the unpaid part is accounted at the rate applicable at the date of acceptance of the property to accounting. | Not revalued after the transfer of ownership |
| Goods, materials | | |

| Accounting object | Accounting | Tax accounting |
|---|---|---|
| Accounts receivable (less the granted advances)<br>Accounts payable (less the granted advances) | Revalued at the reporting date and at the date of the transaction in foreign currency | Revalued at the date of termination (fulfillment) of claims (liabilities) and (or) on the last day of the current month |
| Granted loans<br>Received loans | Revalued at the reporting date and at the date of the transaction in foreign currency | Revalued at the reporting date and at the date of the transaction in foreign currency |
| Financial investmentsin securities | Revalued at the reporting date and at the date of the transaction in foreign currency | Not revalued |
| Financial investments in shares | Not revalued | Not revalued |
| Granted advances<br>Received advances | Not revalued after the issue (receipt) | Not revalued after the issue (receipt) |
| Revenues from sales | Valued at the exchange rate at the date of recognition of the revenue.<br>If the advance has been received prior to recognition of the revenue, the prepaid part of the sale is taken into account at the exchange rate as at the date of receipt of the advance, while the unpaid part is accounted at the exchange rate as at the date of recognition of the revenue.<br>The revenue is recognized in the accounting records subject to the following conditions:<br>• The organization is entitled to receive this revenue, which is arising from a particular agreement or confirmed by other appropriate means;<br>• The amount of the revenue can be determined;<br>• There is certainty that the economic benefits of the organization will increase as a result of a particular transaction; | Valued at the exchange rate as at the date of receipt of the income – the moment of transfer of ownership to the goods, results of performed works by one person for other person, compensated provision of services by one person to other person.<br>If the advance has been received prior to recognition of the revenue, the prepaid part of the sale is taken into account at the exchange rate as at the date of receipt of the advance, while the unpaid part is accounted at the exchange rate as at the date of recognition of the income. |





| Accounting object | Accounting | Tax accounting |
|---|---|---|
| | • Ownership (possession, use and disposal) of the products (goods) has transferred from the organization to the buyer or the customer has accepted the work (the service has been rendered);<br>• The costs that are incurred or will be incurred in connection with this transaction can be determined. | |
| Expenses related to sales | Valued at the rate as at the date of recognition of the expenses.<br>If the advance has been received prior to recognition of the revenue, the prepaid part of the sale is taken into account at the exchange rate as at the date of receipt of the advance, while the unpaid part is accounted at the exchange rate as at the date of recognition of the expenses.<br>The expenses are recognized in the accounting records subject to the following conditions:<br>• The expenditure is made in accordance with a specific agreement, the requirement of legislative and regulatory acts, good business practices;<br>• The amount of the expenditure can be determined;<br>• There is certainty that the economic benefits of the organization will decrease as a result of a particular transaction. | Valued at the rate as at the date of recognition of the expenses.<br>If the advance has been received prior to recognition of the revenue, the prepaid part of the sale is taken into account at the exchange rate as at the date of receipt of the advance, while the unpaid part is accounted at the exchange rate as at the date of recognition of the expenses.<br>The expenses are recognized in the reporting (tax) period when these expenses occur based on terms of the transactions. |

does not stipulate the interim accounting statements.

## Exchange differences and profit of controlled foreign companies

When calculating the profits of the CFCs the exchange differences are not taken into account. It follows from the recent explanations of the Ministry of Finance of the Russian Federation No. 03-12-11/2/7395 dated February 10, 2017.

According to the Ministry of Finance of Russia, in calculation of the share of the income specified in paragraph 4 of Article 309.1 of the Tax Code of the Russian Federation for the period, for which the foreign organization prepares financial statements for the fiscal year, the amounts of exchange differences on purchase and sale of foreign currency and the exchange differences resulting from revaluation of assets and liabilities of the controlled foreign company, which are recognized in the Statement of Profit and Loss according to applicable standards of preparation of financial statements, are not taken into account in the total amount of the corporate income according to such financial statements.

## VAT from exchange differences

The exchange differences do not participate in the formation of the VAT tax base. Let us consider the example of how it works.

Let us consider the transaction of purchase of goods which costs 118 euros, including VAT 18 euros. The payment is made at the exchange rate of euro on the date of payment. The agreement stipulates the 50% prepayment. Euro exchange rates:

- As at the date of prepayment — 70;
- As at the date of shipment from the seller's stock — 71;
- As at the date of delivery to the buyer's stock — 72;
- As at the date of payment after the delivery — 68.

1. Transfer of prepayment debit 60 credit 51 — 4 130 RUB (118 × 0,5 × 70).
2. Shipping:

The invoice will be issued for 4 130 RUB + (118 × 0,5 × 71) = 8 319 RUB, including VAT 1 269 RUB.

3. Delivery of the goods:
   - Debit 10 credit 60 = 7 100 RUB (118 × 0,5 × 70) + (118 × 0,5 × 72);
   - Debit 19 credit 60 = 1 269 RUB (under the invoice).
4. Revaluation and additional payment:
   - Debit 60 credit 91 — 227 RUB — revaluation of accounts payable (7 100 + 1 269 - 4 130) - (118 × 0.5 × 68);
   - Debit 60 credit 51 — 4 012 RUB — additional payment to the supplier.

According to Paragraph 4 of Article 153 of the Tax Code of the Russian Federation, if in sales of goods (works, services), property rights under agreements, the payment obligation of which is provided in RUB in the amount equal to a certain amount in foreign currency or notional currency units, the moment of determination of the tax base shall be the day of shipping (transfer) of the goods (works, services), property rights, when determining the tax base, the foreign currency or notional currency units shall be converted to RUB at the exchange rate of the Central Bank of the Russian Federation as at date of shipping (transfer) of the goods (works, services), transfer of property rights. In subsequent payment of the goods (works, services), property rights the tax base is not adjusted. The differences in the tax amount arising with the taxpayer-seller in subsequent payment the goods (works, services), property rights are taken into account as non-operating income according to Article 250 of the Tax Code of the Russian Federation or as non-operating expenses according to Article 265 of the Tax Code of the Russian Federation.

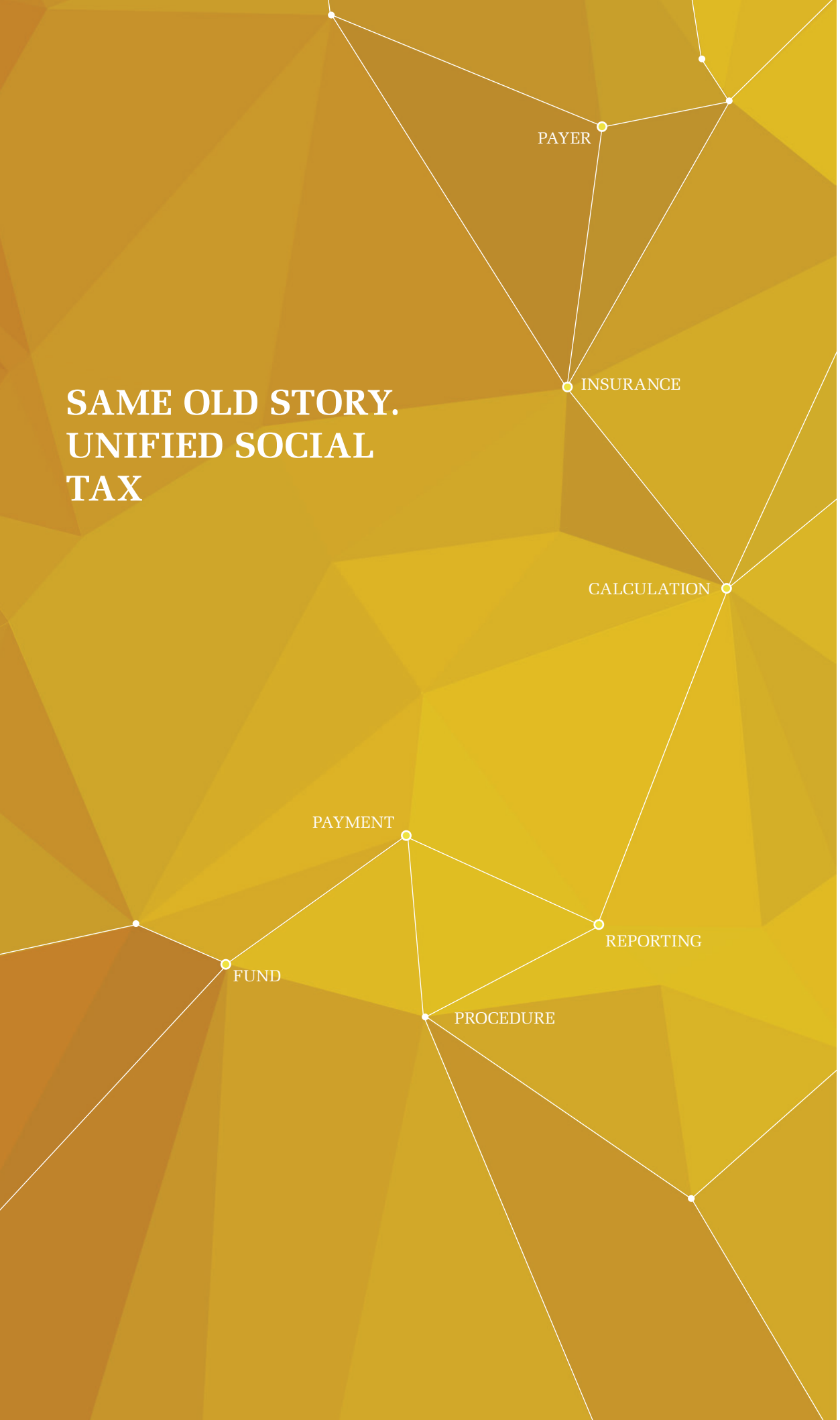




For the purposes of applying VAT, the date of shipment of the goods shall be the date of the primary execution of the initial document executed in the name of the buyer or transporter of the goods (Letter from the Federal Tax Service of Russia No. ЕД-4-3/21217@ dated December 13, 2012).

When determining the tax base on the day of shipping of goods (performance of works, provision of services) against the earlier full prepayment in RUB, the tax base shall be determined on the basis of the received full prepayment in RUB without conversion at the rate of the Central Bank of the Russian Federation as at the date of shipping (Letter from the Ministry of Finance of Russia No. 03-07-15/70 dated July 06, 2012).

Thus, VAT is not adjusted in revaluation of debts.




# SAME OLD STORY. UNIFIED SOCIAL TAX



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As we all know, from 2017 tax authorities have resumed the administration of insurance premiums, for which reason budget classification codes and the form of insurance premiums calculation have been changed.

In this regard, taxpayers have many questions:

- How to amend the reports for 2016 and earlier periods and where to submit them?
- Under which budget classification codes shall the taxes for 2016 and earlier periods be paid?
- Is it necessary to submit any reports to the Pension Fund and the Social Insurance Fund in 2017 or should the reports be submitted to tax authorities only?
- How to complete the new reporting form and within what timeframe?

There are many questions indeed, because any changes create a misunderstanding between the administrative authority and the payer. While everything is clear about the payment, the first reports are to be prepared and submitted to tax authorities only in early May.

The Federal Tax Service has issued Taxpayer's Memo, which was sent by telecommunications channels, to help the taxpayers. The following issues are explained in this memo:

- From January 01, 2017 the payment of insurance premiums, including for accounting periods which have expired before January 01, 2017, shall be made under the new budget classification codes (effective from 01.01.2017);
- Calculations for accrued and paid insurance premiums for 2016 and updated calculations for the periods from 2010 to 2016 shall be submitted to territorial bodies of the Pension Fund and the Social Insurance Fund in the forms and formats effective during the respective calculation period;
- Calculations for insurance premiums for reporting (calculation) periods, starting with reports for the 1st quarter of 2017, shall be submitted to tax authorities at the place of registration;
- Calculations for accrued and paid insurance premiums for compulsory insurance against industrial accidents and occupational illnesses as well as for the expenses for the payment of insurance coverage in the 4-FSS form shall be submitted to territorial bodies of the Russian Social Insurance

Fund starting with the reports for the 1st quarter of 2017.

However, the specified memo does not include information that the obligation to submit the reports in the SZV-M form, which was submitted monthly in 2016, has not been withdrawn from the payers of insurance premiums.

Despite the fact that only one regulatory authority will exercise control over the completeness of calculation and payment of insurance premiums instead of three non-budgetary funds, there will not be less reports in 2017.

- For pension insurance — 182 1 02 02010 06 1000 160;
- For health insurance — 182 1 02 02101 08 1011 160;
- For social disability insurance — 182 1 02 02090 07 1000 160.

The insurance premiums for the periods starting from January 01, 2017 shall be paid under the following budget classification codes:

- For pension insurance — 182 1 02 02010 06 1010 160;
- For health insurance — 182 1 02 02101 08 1013 160;
- For social disability insurance — 182 1 02 02090 07 1010 160.

Procedure of calculation and payment of insurance premiums as well as procedure of submission of reports on insurance premiums is now contained in Chapter 34 Insurance Premiums of the Tax Code of the Russian Federation.

Essentially, Chapter 34 of the Tax Code of the Russian Federation largely conforms to the law on insurance premiums[2], which, albeit regular amendments, has been used by the payers of insurance premiums for six years.

A significant difference from the last year's rules is the change in the procedure of levying daily allowances for business trips. If the amounts of the daily allowances were not subject to insurance premiums in the amount stipulated by local regulations earlier on, now the amount of the daily allowances within 700 RUB for business trips in the Russian Federation and within 2 500 RUB for foreign business trips is not subject to insurance premiums.

That is, from January 01, 2017 the unified limits of the amounts of daily allowances which are not subject to individual income tax and insurance premiums have been established.

| Report subject | Report form in 2016 | Report form in 2017 |
|---|---|---|
| Pension insurance | RSV-1 | KND 1151111[1] |
| Health insurance | RSV-1 | KND 1151111 |
| Social disability insurance | 4-FSS | KND 1151111 |
| Social insurance against accidents and occupational injuries | 4-FSS | 4-FSS |
| Information about insured persons | SZV-M | SZV-M |

The new Calculation of Insurance Premiums combines the RSV-1 and 4-FSS forms, although the social insurance against accidents and occupational injuries remains in the competence of the Social Insurance Fund, and a separate 4-FSS calculation shall be submitted on these premiums.

Thus, the desire of legislators to get rid of excess bureaucracy has currently produced no results. However, this is just the first year of the new rules.

The reports for the periods preceding 2017 shall be submitted in the formats effective during the reporting period for which the reports are submitted, but the payment shall be made under the new budget classification codes.

The insurance premiums for the periods preceding 2017 shall be paid under the following budget classification codes:

1. Approved by Decree of the Russian Federal Tax Service No. MMB-7-11/551@ dated 10.10.2016 (Registered in the Russian Ministry of Justice under No. 44141 on 26.10.2016).
2. Federal Law on Insurance Premiums No. 212-fz dated 24.07.2009 On Insurance Premiums to the Pension Fund of the Russian Federation, the Social Insurance Fund of the Russian Federation and the Federal Health Insurance Fund.





That is, from January 01, 2017 the unified limits of the amounts of daily allowances which are not subject to individual income tax and insurance premiums have been established.

| Reporting period | Submission date |
|---|---|
| 1st quarter of 2017 | May 02, 2017 |
| 6 months of 2017 | July 31, 2017 |
| 9 months of 2017 | October 30, 2017 |
| 2017 | April 30, 2018 |

From 2017, the new deadline for submitting the reports on insurance premiums to regulatory bodies has been established. Now, the submission deadline is not the 15th day of the second month after the end of the reporting period, but 30 days from the end of the reporting period (quarter).

Several amendments have been introduced into the Law On Individual (Personified) Accounting in Compulsory Pension Insurance System[3] in terms of extending the deadline for the submission of the SZV-M report. From January 01, 2017 the said report shall be submitted to the Russian Pension Fund until the 15th day of the month following the reporting period. As before, the reporting period is a calendar month.

A distressing innovation of the new revision of the law on personified accounting is the fine for a hard copy of personified accounting data by organizations with staff of more than 25 people. The fine is 1 000 RUB.

In 2017 quarterly Calculations of Insurance Premiums (under the KND 1151111 form) shall be prepared and submitted to tax authorities within the following periods (table below).

Deadlines for payment of the insurance premiums remain the same — until the 15th day of the month following the month of income accrual.

The bodies of the Russian Pension Insurance Fund, the Social Insurance Fund and the Federal Tax Service have been actively publishing explanatory information on their official websites since July 2016.

The website of the Russian Pension Insurance Fund contains information that in 2017 the territorial bodies of the Russian Pension Insurance Fund and the Social Insurance Fund retain the functions of on-site (repeated on-site) audits for the periods before January 01, 2017. The on-site audits are performed in the manner effective before January 01 of the current year. The audit shall cover the period not exceeding three calendar years preceding the calendar year when it was resolved to conduct the on-site audit. Simply put, in 2017 the Russian Pension Insurance Fund and the Social Insurance Fund will conduct on-site audits for the period from 2014 till 2016.

The retention of the specified functions by the Russian Pension Insurance Fund and the Social Insurance Fund is well justified, since the reports for 2014 — 2016 were submitted to the funds and the Federal Tax Service will not be able to audit the periods ended before 2017.

The Russian Federal Tax Service has stated that if the information about the aggregate amount of insurance premi-

3. Federal Law On Individual (Personified) Accounting in Compulsory Pension Insurance System No.27-fz dated 01.04.1996.

ums for compulsory pension insurance does not conform to the information about the calculated premiums for each insured person in the submitted calculation of insurance premiums, and (or) tax authorities reveal unreliable personal data identifying the insured individuals, such calculation shall be deemed non-submitted, of which the payer will be sent the respective notice.

In this regard, the payers should carefully fill in the reports on insurance premiums and timely submit these reports so as to be able to make adjustments in the event of receipt of a negative protocol from the Federal Tax Service.

The Ministry of Finance in its turn has pointed to the fact that the explanations given by the Ministry of Labor and Social Protection, the Russian Pension Fund, the Social Insurance Fund and the Ministry of Health and Social Development may be applied to the extent that does not contradict the Tax Code of the Russian Federation.

Thus, summing up the changes in the laws on insurance premiums, we can single out one change in favor of the payers of the premiums:

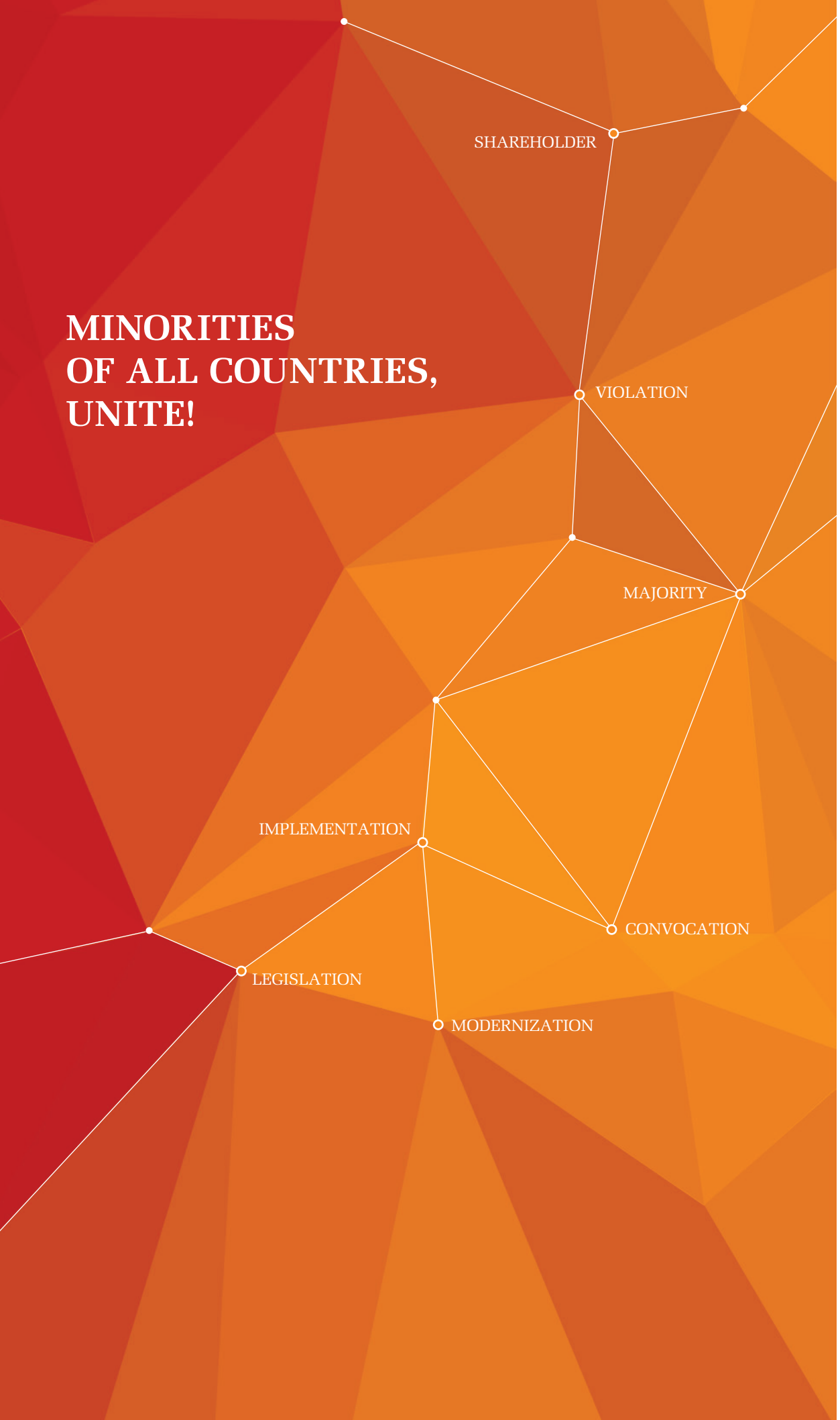
- Postponement of the deadline for the submission of the SZV-M report from the 10th to the 15th day of each month.

The negative changes are as follows:

- Postponement of the deadline for the submission of the report on insurance premiums from the 15th day of the second month following the reporting month to the 30th day of the month following the reporting month;
- Introduction of limits for the exemption of the daily allowances from insurance premiums;
- Introduction of a fine for the violation of the procedure for the submission of the report on insurance premiums to tax authorities;
- The fact that the calculation shall be deemed non-submitted if the information about the aggregate amount of the premiums does not conform to personified data or if there are unreliable personal data of the insured persons in the calculation on insurance premiums.

Introduction of the new calculation form will not in any way affect the payers of insurance premiums, except the need to find time to study the instruction for the completion of the form.

Detailed instructions for filling in the new calculation of insurance premiums are contained in Decree of the Federal Tax Service No. MMB-7-11/551@ On the Approval of the Form of Calculation of Insurance Premiums, the Procedure for Its Completion and the Format of Submission of Online Calculations of Insurance Premiums dated October 10, 2016.




# MINORITIES OF ALL COUNTRIES, UNITE!



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As it is known, in the system of corporate relations the central player is the shareholder. In fact, all corporate legislation is, to one degree or another, aimed at ensuring the shareholder's rights for the development of a healthy corporate climate in Russia. Russian corporate legislation is currently experiencing a period of rapid development. Numerous innovations in the field of protection of the shareholders' rights confirm this fact.

At the same time, special attention is paid to the relations between the shareholders themselves, and the balance of rights and legitimate interests of minority and majority shareholders is considered to be one of the most difficult problems of corporate relations.

It should be noted that the legislator does not provide for the division of shareholders into minority and majority shareholders. However, courts often resort to this definition in their decisions, noting that minority shareholders are a weak link in the system of corporate relations.

This article shall consider some aspects of the implementation of rights by minority shareholders.

Analysis of the regulations of the federal legislation on joint-stock companies allows concluding that the limits of the shareholder's authority directly depend on the amount of shares it holds. This is clearly shown in the table below.

| Percentage of the voting shares | Rights and opportunities of the shareholder |
|---|---|
| Any number of shares | • The right to participate in the general meeting of shareholders with the right to vote on all issues within its competence, the right to receive dividends, and the right to receive part of its property in case of the company liquidation.<br>• The right to receive information on the conduct of a general meeting of shareholders.<br>• The right to participate in the general meeting of shareholders through its representative. |

| Percentage of the voting shares | Rights and opportunities of the shareholder |
|---|---|
| | • The preemptive right to purchase additional shares and securities convertible into shares placed by open subscription in the amount proportional to the number of shares of this category (type) owned by it.<br>• The preemptive right to purchase additional shares and equity securities convertible into shares placed through a closed subscription in the amount proportional to the number of owned shares of this category (type), if the shareholder voted against this decision or did not participate in the voting.<br>• The right to become acquainted with the documents of the company specified in paragraph 1, Article 89 of the Federal Law "On Joint-Stock Companies" (save for accounting documents and minutes of meetings of the collegial executive body). |
| 1% | • The right to become acquainted with the list of persons entitled to participate in the general meeting of shareholders.<br>• The right to obtain from the registrar information from the register support system containing the names of the owners (names), quantity, category (type) and nominal value of its shares.<br>• The right to file a lawsuit against a member of the board of directors, a sole executive body (general director), a member of the collegial executive body, as well as a managing organization or manager to recover damages caused to the company by their guilty actions (omissions). |
| 2% | • The right to put issues on the agenda of the annual general meeting of shareholders and nominate candidates for the board of directors, collegial executive body, audit commission, ballot commission, candidate for the position of the sole executive body.<br>• The right to submit draft decisions on the proposed issues. |
| 10% | • The right to demand convocation of an extraordinary general meeting of shareholders, the right to include issues on the agenda of the meeting and the right to nominate candidates to the management bodies of the company.<br>• The right to audit financial and economic activities of the company. |
| 20% | • A shareholder holding 20 percent of shares or more is considered to be interested in the company's transaction which it is a party to, a beneficiary, an intermediary or a representative. |





To date, the main body that controls compliance with the legislation in the field of the protection of the investors' rights is the Bank of Russia.

Let us recall that on the financial market the Bank of Russia is a mega-regulator. In order to implement the functions for the protection of rights and legitimate interests of shareholders and investors on the financial markets, the Bank of Russia is vested with broad authorities with respect to issuers at the conduct of their activities on the financial markets and in the area of regulation of corporate relations in joint-stock companies. In particular, the Central Bank of the Russian Federation establishes requirements for the procedure of preparation, convocation and holding of a general meeting of shareholders, establishes a list of information mandatory for persons entitled to participate in the general meeting of shareholders and controls the acquisition of shares.

According to statistics provided by the Bank of Russia, 3382 complaints concerning violations of federal legislation by issuers were submitted to the Service for the Protection of the Rights of Consumers of Financial Services and Minority Shareholders of the Bank of Russia during the period from II to IV quarter of 2016.

The main reasons for the appeals of shareholders were the following violations:

- Violation of the procedure for the disclosure of information by issuers;
- Failure to submit documents at the request of the shareholder;
- Failure to send a mandatory offer to acquire shares.

## Violation of the procedure for the disclosure of information by issuers

In accordance with paragraph 1, Article 30 of the Federal Law "On the Securities Market", the disclosure of information on the securities market means guaranteeing its availability to all interested persons, regardless of the purpose for obtaining this information in accordance with the procedure that guarantees its discovery and receipt.

Public joint-stock companies shall unconditionally disclose the following information:

- Annual report of the company;
- Annual accounting statements of the company;
- Prospectus of the company's securities in cases provided for by legal acts of the Russian Federation;
- Notification of a general meeting of shareholders in accordance with the procedure provided for by this Federal Law;
- Other information determined by the Bank of Russia.

"Other information determined by the Bank of Russia" means, first of all, documents and information, the disclosure of which is provided for by the "Regulation on Disclosure of Information by Issuers of Equity Securities" (approved by the Bank of Russia on December 30, 2014 No. 454-P).

The specified information should be disclosed in the news line of at least one of the information agencies, which in due course are authorized to disclose information about securities and other financial instruments. Thus, the legislator ensures the access of the shareholder, as well as other interested parties, to general information on the activities of the joint-stock company.

The sanction for the violation of the procedure and deadlines for the disclosure of information is provided for by the Code of the Russian Federation on Administrative Offenses. For legal entities the fine for such violations is from seven hundred thousand to one million rubles.

## Failure to submit documents at the request of the shareholder

Russian corporate law imposes the obligation to keep a list of documents specified by law on the joint-stock company. The company keeps the documents

provided for by paragraph 1, Article 89 of the Federal Law "On Joint-Stock Companies" at the location of its executive body in the manner and within the time limits established by the Bank of Russia.

The company shall provide these documents within seven working days from the date of sending the relevant request. Violation of the time limits for the provision of documents by the joint-stock company also entails the imposition of an administrative fine in the amount of five hundred to seven hundred thousand rubles.

The procedure for sending a mandatory offer to minority shareholders within the framework of acquisition of large stakes deserves separate attention.

The process of acquiring large stakes is closely connected with the notion of a corporate control. The establishment of a special procedure related to the purchase of significant stocks of shares is due to the fact that the new owner actually establishes (or attempts to establish) corporate control over the joint-stock company. The change in corporate control could potentially affect the interests of a large number of individuals, including minority shareholders and members of the management bodies of the joint-stock company.

A mandatory offer is a public offer addressed to shareholders — owners of shares of the relevant categories (types), on the acquisition of shares of the open company owned by them.

A mandatory offer is addressed to anyone who responds to it. It is designed to protect the interests not of individual groups, but of all shareholders of the company. If the increase in the rights of corporate control by a person who has acquired a large stock of shares does not correspond to the economic interests of minority shareholders, they have the opportunity to leave the company and return their investments by accepting a public offer.

A mandatory offer to acquire shares in a joint-stock company, as well as other equity securities convertible into shares of an open company, is exercised in accordance with the procedure provided for by the law on joint-stock companies by a person who acquired more than 30% of the total number of shares of the company specified in paragraph 1, Article 84 of the Law "On Joint-Stock Companies", taking into account the shares owned by this person and its affiliates.

The conflict of interests of shareholders and the investor arises in the event the purchaser of shares fails to fulfill the obligation to send a mandatory offer to the company, if the quantity of securities purchased by it exceeds 30 percent of the voting shares of the company.

Proceeding from the regulations of the current legislation, as a legal consequence of failure to fulfill the obligation to send a public offer by a person who has acquired more than 30 percent of the total number of shares of the open company, the law provides for limiting the number of shares by which such person and its affiliates are entitled to vote before the date of sending a mandatory offer.

At the same time, the legislator provides for certain thresholds of ownership, exceeding which the number of shares that a shareholder can vote changes (the one failed to fulfill the obligation to send a mandatory offer to redeem securities) — 30 percent, 50 percent and 75 percent, respectively.

Exceeding the threshold of 30 percent, but not reaching 50 percent, the shareholder can only vote by 30 percent of the shares before sending a mandatory offer.

Exceeding the threshold of 50, but not reaching 75 percent, the shareholder can only vote by 50 percent of the shares before sending a mandatory offer. A similar scheme applies when the threshold of 75% is exceeded.

Summarizing the foregoing, I believe that the modernization of the legislative framework, as well as the work of authorized state authorities in the sphere of regulation of corporate relations, gives its positive results. However, much remains to be done in order to resolve the issue of trust of the shareholders of Russian companies, both to issuers and to state executive bodies responsible for observing interests and protecting the rights of minority shareholders.

# SUBSIDIARY LIABILITY OF CONTROLLING PERSONS AT BANKRUPTCY



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Any company may have a moment when it is unable to meet its obligations to creditors. At bankruptcy, the most dangerous for the personal welfare of owners and business executives is the risk of bringing to subsidiary liability, stipulated by Article 10 of the Federal Law "On Insolvency (Bankruptcy)" (hereinafter, the FZ "On Bankruptcy"). This law, taking into account the new amendments that come into force on June 28, 2017, will continue to develop, providing competitive creditors and the authorized body with more instruments to collect debts.

Subsidiary liability may be imposed on persons controlling the debtor. In the context of the Russian insolvency law, a "controlling person" means any person who, in the three-year period prior to accepting the petition for the recognition of the debtor as a bankrupt, had the opportunity to influence the decisions made by the company in one way or another. Namely, it had the right to give instructions binding on the debtor or had the opportunity, by virtue of being in relations of kinship or property with the debtor, by virtue of its official position or otherwise determine the actions of the debtor, including by coercing the manager or members of the debtor's management bodies or exerting a decisive influence on the manager or members of the debtor's management bodies in a different way.

The notion of a "controlling person" established by the Federal Law "On Bankruptcy" is quite broad, and its definition, with a sufficient evidence basis, may include a wide range of persons — participants, shareholders, general director, its deputies, members of the board of directors, chief accountant, beneficial owner, as well as other persons. A petition for bringing these persons to subsidiary liability may be filed by a bankruptcy trustee, a bankruptcy creditor, a representative of the debtor's employees, an employee and a former employee of the debtor or an authorized body.

Subsidiary liability itself is a civil law institution, therefore, its application shall take into account the general provisions of Chapters 25 and 59 of the Civil Code of the Russian Federation on liability for violations of obligations and on obligations as a result of causing harm in part that does not contradict the special provisions of the FZ "On Bankruptcy".

## Grounds for liability

Currently, the provisions of the Federal Law "On Bankruptcy" provide for two grounds for bringing persons controlling

the debtor to subsidiary liability under its obligations:

1. Untimely submission by the company's manager or a liquidation commission of a petition for recognition of a company as a bankrupt to an arbitration court (Article 9 and Clause 2 Article 10 of the Federal Law "On Bankruptcy").
2. Actions (omissions) by the controlling persons as a result of which the company is declared a bankrupt (Clause 4 Article 10 of the Federal Law "On Bankruptcy").

## Failure to file a bankruptcy petition

The provisions of Article 9 of the Federal Law "On Bankruptcy" provide for the obligation of the manager of a legal entity to apply for bankruptcy in the following cases:

- Satisfaction of the claims of one creditor or several creditors leads to the impossibility of the debtor's performance of monetary obligations or obligations to pay mandatory payments or other payments in full to other creditors;
- The debtor's body, authorized in accordance with its constituent documents to take a decision on the liquidation of the debtor, decided to apply to the arbitration court with the debtor's application;
- The body authorized by the owner of the property of the debtor — unitary enterprise decided to apply to the arbitration court with the debtor's petition;
- The foreclosure of the debtor's property will significantly complicate or make impossible the economic activity of the debtor;
- The debtor meets the criteria of insolvency and (or) criteria of insufficiency of property;
- There is a debt outstanding for more than three months due to insufficiency of monetary funds for severance payments, wages and other payments to employees, a former employee in the amount and in the manner established in accordance with the labor legislation.

With regard to bringing to subsidiary liability for failure to file a petition for recognition of its company insolvent, there is a presumption of a causal link between the omission of the manager in the form of failure to file a petition to declare its company bankrupt and harm caused to the property interests of creditors because of the impossibility to settle the increased debts.

The fundamental issue in considering the petition for subsidiary liability in case of failure to file a bankruptcy petition will be the determination of the time when the debtor's manager should have found out about the company's signs of insolvency or other grounds for filing a bankruptcy petition. Difficulties may arise with the determination of the time with respect to some grounds for filing a bankruptcy petition by the debtor. The court in this case will proceed from the principle of good faith, namely, when in a similar situation in the framework of the company's regular business activities, a reasonable and conscientious manager should have found out about the signs of insolvency and insufficiency of property and submitted a relevant petition to the court.

For example:

In case No. A50-20613/2010 of 08.09.2014 the Supreme Court of the Russian Federation established that the manager is considered aware of the signs of insufficiency of property from the time of signing the financial statements. However, accounting statements alone cannot be indicative of the company's impossibility to perform its monetary obligations to creditors without a documentary analysis of the contained records. As a rule, the amount of assets and the amount of the company's liabilities correlate in determining the formal sign of insufficiency of property. At the same time, the formal negative value of assets, determined according to the financial statements, in the absence of other evidence of insolvency, does not indicate the company's inability to fulfill its obligations, for example, as stated in the ruling of the AC of FED No. F03-6136/2014 of 27.01.2015.

## Actions (omissions) of the controlling persons, which resulted in the company's recognition as a bankrupt

Owners and business managers often use various instruments to minimize risks in anticipation of bankruptcy. Liquid assets in the form of real estate, commodities and materials, rights of claims are transferred to other controlled legal entities; important documents are seized from the company's files; bookkeeping is distorted. For a long time, various schemes for leaving problematic legal entities with debt obligations hanging on them have been popular among business owners: the companies change their legal address to a more remote one, a person who is unknown to anyone is appointed as a general director, and the interested persons themselves simply try to forget about these companies and to distance themselves from them as far as possible. But in the course of bankruptcy proceedings, these schemes can be disclosed by the bankruptcy trustee with the assistance of creditors or other interested persons.

It should be known that in relation to the ground for bringing to subsidiary liability provided by Clause 4, Article 10 of the Federal Law "On Bankruptcy", there is a presumption of guilt of controlling persons in the following circumstances:

- Harm has been caused to property rights of creditors as a result of actions by this person or for the benefit of the person or the approval by this person of one or several transactions of the debtor, including transactions that have the signs of voidability in accordance with the Federal Law "On Bankruptcy";
- Accounting and reporting documents at the time of the decision on the introduction of monitoring or decision to declare the debtor as a bankrupt are missing or do not contain information about the objects provided by the Russian legislation, or this information is distorted, resulting in significantly hampered procedures used in case of bankruptcy, including the formation and implementation of the bankruptcy estate;
- Claims of third-priority creditors for the principal amount of debt incurred as a result of the offenses for which there is a valid decision to bring the debtor or its officers, who are or were its sole executive body, to the criminal or administrative responsibility or liability for tax offenses, including the requirements for the payment of debt, revealed as a result of proceedings on such violations, exceed 50% of the total amount of the claims of third-priority creditors for the principal amount of debt included in the register of creditors' claims as of the closing date of the register of creditors' claims.

There is extensive court practice with respect to the first two grounds that allows saying how facts are established that presume the guilt of controlling persons at the submission of a petition for subsidiary liability. A prerequisite is the existence of a causal link between the use of its rights and (or) opportunities with respect to a controlled economic entity and a set of legally significant actions carried out by a controlled entity, the result of which is its insolvency (bankruptcy).

1. The liability provided for by Art. 10 of the Federal Law "On Bankruptcy" for non-transfer/lack of documentation is aimed primarily at the implementation of the opportunity to form a bankruptcy estate, in particular, by filing lawsuits to recover debts from third parties, by returning property from illegal possession and challenging the debtor's[1] transactions. Therefore, the very fact of the manager's evasion from transferring accounting documents to the arbitration man-

1. Decree of the Presidium of the Supreme Arbitration Court of the Russian Federation No. 9127/12 dated 06.11.2012.

ager is an independent condition for bringing to subsidiary liability. In order to bring the manager to liability, under these circumstances it is not necessary to prove that the absence of accounting documents entailed the company's bankruptcy, because the very fact of their absence entails difficulties in the formation of the bankruptcy estate. However, arbitration courts in deciding on bringing of controlling persons to subsidiary liability proceed from the guilt and general provisions of the civil law, namely Art. 1064 of the Civil Code of the Russian Federation, which establishes that the person who caused harm is exempt from compensation for harm, if it proves that the harm was caused not through its fault, and the burden of proving the absence of guilt would fall on the controlling persons. For example, in case A05-1511/2011, the court of cassation instance left unchanged the ruling of the appellate court on the refusal to bring the manager to subsidiary liability without change and indicated that the manager had performed its duties for less than a month and in so little time could neither restore nor draw up the missing debtor's documentation.

2. Causing harm to the property rights of creditors as a result of the commission or approval by the controlling person of one or more of the debtor's transactions often means the transaction or a set of several transactions aimed at the withdrawal of the debtor's assets without providing it with an economically justified equivalent or free of charge. It is important to understand that if in the bankruptcy case the petition for challenging the transaction is satisfied on the grounds stipulated by the Federal Law "On Bankruptcy", when a part of the property is returned or the property in full is not returned to the bankruptcy estate, the fact of the court order will have a prejudicial significance in proving within the framework of consideration of the petition for bringing to subsidiary liability. However, when the property in full is returned to the bankruptcy estate, if the transaction is recognized invalid, there will be no grounds for bringing to subsidiary liability.
3. In the summer of 2016, a new basis for bringing to subsidiary liability of the director or other manager of the debtor came into force. Now it is possible, if more than 50% of all claims arose as a result of an offense (including tax offenses), which was committed during the manager's office. This provision applies to a person who was the sole executive body of the debtor at the time the debtor or its sole executive body committed the offense. According to the explanations given in paragraph 9 of Article 13 of Federal Law No. 222-FZ of 23.06.16, the provisions apply to claims for bringing persons controlling the debtor to subsidiary liability or claims for bringing persons controlling the debtor in the form of damages recovery submitted after September 1, 2016. This provision is relatively new and currently there is little practice on it, but so far, as expected, the main applicant under such grounds for prosecution is the authorized body (the Federal Tax Service), for the convenience of which this rule was adopted.

## Procedure for determining the amount of subsidiary liability

In case of satisfaction of a claim to bring a controlling person to subsidiary liability in the presence of uncompleted settlements with creditors, the court suspends consideration of this claim until the end of the settlements with creditors after the establishment of all other relevant facts. The courts proceed from the provision that the size of subsidiary liability of the person controlling the debtor is equal to the aggregate amount of creditors' claims included in the register of creditors' claims, as well as claims of creditors filed after the closure of the register of creditors' claims and claims of creditors on





current payments that have not been paid due to insufficiency of the debtor's property. Consequently, the size of subsidiary liability can be definitively determined only after the end of the formation of the bankruptcy estate and the completion of settlements with creditors.

## Innovations in 2016–2017

Federal Law No. 488-FZ of December 28, 2016 "On Amending Certain Legislative Acts of the Russian Federation" provides for a number of innovations aimed at ensuring the rights and legal interests of creditors in cases of bankruptcy of legal entities. In particular, for the Federal Law "On Bankruptcy" there are amendments that improve the mechanism of bringing to subsidiary liability persons controlling the debtor, namely one of the main innovations in the Federal Law "On Bankruptcy" in 2017 will be the possibility of bringing to subsidiary liability persons controlling the debtor already after the completion of company's liquidation procedures.

The bankruptcy trustee, bankruptcy creditors and the authorized body will have more opportunities to form a bankruptcy estate, and the risks of managers and owners in case of unlawful behavior will increase, since now people who are entitled to file a relevant petition have three years after the completion of the bankruptcy procedure, and in case of valid excuse this period can be restored.

In general, there is a strengthening of the position of the authorized body in bankruptcy procedures. If we sum up the innovations in the legislation, in 2016, a new basis for bringing to subsidiary liability for offenses (including tax offenses) emerged, the notion of a "controlling person" has been expanded and the term of the pre-bankrupt period has been increased from two to three years within the framework of which grounds for bringing to subsidiary liability are identified.

In addition, the authorized body also received the opportunity to be included in the register of creditors' claims within 6 months after its closure, namely, if on the closing day the register of creditors' claims is not passed or the judicial act or an act of another authorized state body that in accordance with the legislation of the Russian Federation is mandatory for the identification of arrears is not effective. These claims shall be deemed to be filed on time. The specified provision gives additional time to the tax authorities and will allow including the maximum amount of debt on obligatory payments already after the register of creditors' claims is closed, for example, based on the results of a field tax audit or submission of specified declarations by the debtor.

## About the Company

Korpus Prava was established in 2003 in Moscow, Russia. Together with our offices in Russia, Cyprus, Malta, Latvia and Hong Kong we offer clients a truly international service. Our highly qualified and friendly staff is available to provide to the clients a flexible, reliable and efficient service.

The mission of the Company is to raise the business value of the client and bring down risks.

### Korpus Prava offers services in:

- Legal and tax consulting
- Transformation of financial statements to IFRS
- International tax planning
- Project consulting
- Corporate services
- Capital transactions / M&A
- Tax disputes
- Economic disputes and bankruptcy
- Real estate transactions
- Intellectual property
- Financial Consulting

The company is mentioned in the rankings of the leading international directory “Legal 500” that is completely and comprehensively overtaking the global scope of legal services.

Korpus Prava was nominated as the best legal firm in Russia according to the authoritative magazine “The Lawyer”; it takes one of the leading positions amongst Top 50 legal firms in Cyprus, and it has also been recognised as the best international legal firm for tax planning in Cyprus. Korpus Prava Private Wealth Practice has taken fifth place in Private Banking and Private Wealth sector in Russia, in the category of Succession Planning Advice and Trusts according to the annual rankings of Private Banking Russia Survey 2016 of the prestigious magazine “Euromoney” (as of February, 2016).

Korpus Prava is a member of Cyprus Fiduciary Association (CFA) and Franco-Russian Chamber of Commerce and Industry (CCIFR). It takes part in the development of business community, business presentations and the exchange of professional experience.

Our certified specialists conduct seminars and consultations for accountants and the representatives of company financial services; they act as experts, and they are published in popular financial publications.



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